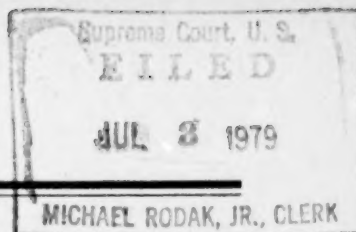


No. 78-1538



In the Supreme Court of the United States

OCTOBER TERM, 1978

JOHN D. CALLAHAN, ET AL., PETITIONERS

v.

CHARLES E. KIMBALL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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This brief is submitted in response to the Court's
invitation of June 4, 1979.

QUESTION PRESENTED

Whether persons enrolled pursuant to the Klamath Termination Act of 1954, as members of the Klamath Indian Tribe—and the descendants of such persons who have since become members of the Tribe—retain a non-exclusive right to hunt, fish, and trap on fed-

erally-owned land formerly within the Klamath Reservation, subject only to state regulation for conservation purposes.

STATEMENT

1. Congress enacted the Klamath Termination Act of 1954, ch. 732, 68 Stat. 718, 25 U.S.C. 564 *et seq.*, to terminate the special relation between the Klamath Tribe and the United States. Under Section 3 of the Act, 25 U.S.C. 564b, the roll of the Klamath Tribe was closed on August 13, 1954, "and no child born thereafter shall be eligible for enrollment * * *." The persons enrolled under the Act were given the choice of receiving "the money value of their interests in tribal property" or retaining an undivided interest in tribal property under the management of a trustee. Section 6, 25 U.S.C. 564e. Persons who elected the former "thereupon cease[d] to be members of the tribe * * *." Section 6(c), 25 U.S.C. 564e(c).

2.a. This lawsuit was filed in 1973 by five members of the Klamath Tribe who had been enrolled in 1954 and elected to receive the money value of their share of tribal property and withdraw from the tribe under Section 6(c) of the Act (Pet. App. 25-26). They contended that the Klamath Termination Act did not abrogate the Klamath Tribe's treaty right to hunt and fish on the lands of the former reservation (see Section 14(b), 25 U.S.C. 564m(b)) and that their withdrawal from the Tribe under Section 6(c) did not affect their membership

in the Tribe for the purpose of asserting these rights. They therefore sought a declaration that petitioners—officials of the State of Oregon responsible for the enforcement of state fish and game laws—could not enforce state regulations interfering with the retained tribal treaty rights.

b. The district court dismissed the action for failure to state a claim upon which relief could be granted (Pet. App. 61-62). The court of appeals reversed (Pet. App. 49-60), reasoning that the Treaty of October 14, 1864, 16 Stat. 707, reserved to the Klamaths the right to hunt and fish on the Klamath Reservation (Pet. App. 51-53) and that this right was again reserved to the Tribe by Section 14(b) of the Termination Act, 25 U.S.C. 564m(b) (Pet. App. 53-60). The court concluded (Pet. App. 60)¹:

Since the Act provides that nothing in it shall abrogate any treaty fishing rights, we conclude that a Klamath Indian possessing such rights on the former reservation at the time of its enactment retains them even though he relinquishes his tribal membership or the reservation shrinks pursuant to the Act. Otherwise, the Act would in fact have resulted in the abrogation of treaty rights.

A petition for a writ of certiorari to review the judgment of the court of appeals was denied by this Court. 419 U.S. 1019 (1974).

¹ The court limited its holding to federally-owned lands within the former reservation and "intimate[d] no opinion on the treaty rights of the Indians vis-a-vis the private Oregon landowners" (Pet. App. 60 n.10).

c. On remand to the district court, respondents filed a supplementary complaint for declaratory and injunctive relief to safeguard treaty hunting and fishing rights from state interference. This complaint was joined in by respondent Klamath Indian Game Commission.² Respondents did not contend that they were entitled to a total immunity from state regulation but proposed to consent to a judgment that would allow state regulation under the following conditions (Pet. App. 40 n.16; *id.* at 45):

1. The specific statute or regulation is required to prevent demonstrable harm to the actual conservation of the game or fish, *i.e.*, it is essential to the perpetuation of a particular species of game or fish.

2. The measure is appropriate to its purpose.

3. Klamath Indian tribal regulation for enforcement is inadequate to prevent demonstrable harm to the actual conservation of the game and fish.

4. The conservation required cannot be achieved to the full extent necessary by restriction of hunting, fishing and trapping by non-treaty sportsmen.

The district court noted that respondents' proposed consent to judgment was "commendable" but concluded that it lacked authority to impose such a judgment on the state. The court agreed with respond-

² The Klamath Indian Game Commission, which is not listed in the caption of the petition, is also a respondent in this case. The Commission intervened in this litigation in 1975 and was a party in the court of appeals (Pet. App. 23, 26).

ents, however, that the tribal treaty hunting, fishing and trapping rights may be invoked by *all* persons enrolled in the Tribe on August 13, 1954—both those who withdrew from the Tribe under Section 6(c) and those who did not—and also by their descendants (Pet. App. 44). The court concluded that the state officials could not enforce Oregon fish and game laws that restrict the treaty rights of these Klamath tribal members.³

The court of appeals upheld the judgment of the district court on the merits but, at petitioners' request, remanded for further findings on the question of appropriate relief. The court emphasized that the objective of the tribal roll created in 1954 under Section 3 of the Termination Act was not to cut off the treaty rights expressly reserved by Section 14(b) of that Act, 25 U.S.C. 564m(b). Instead, it was to determine "who should share in the resulting distribution of [restricted tribal] property" (Pet. App. 38). This roll, the court held, did not affect the continuing existence of the Klamath Tribe or its power to set "criteria for [its own] membership" after federal

³ Respondents have never contended that the Klamath treaty rights remain applicable to former reservation lands that have been transferred to private owners. Nor do they seek to enforce an *exclusive* right to hunt and fish on reservation land that has been retained by the United States. Both the district court (Pet. App. 44) and the court of appeals (Pet. App. 40) thus regarded respondents' claims for relief as subject to these limitations. Petitioners' spectre of uncontrolled treaty-protected activities on former lands of the Klamath reservations sold to others (Pet. 16-19) is therefore not presented in this case.

supervision and services had ceased under the Termination Act (Pet. App. 37-38). The court held, however, that "the State of Oregon has authority, under appropriate standards to regulate treaty fishing, hunting and trapping rights on the former Klamath Indian Reservation for conservation purposes" (Pet. App. 42),⁴ and concluded that it was necessary to remand the case for the district court to develop "a factual record which would serve as a basis for establishing regulations within the scope of the State's right to regulate the Indians' treaty rights" (Pet. App. 41).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review of the decision in this case is therefore unwarranted.

1.a. The conclusion of the court of appeals that the Klamath Termination Act did not abrogate the tribal treaty right to hunt, fish and trap on the lands within the former Klamath Reservation is supported by this Court's decision in *Menominee Tribe v. United States*, 391 U.S. 404 (1968). The Court there held that the Menominee Indian Termination Act of 1954, ch. 303, 68 Stat. 250, 25 U.S.C. (1970 ed.) 891 *et seq.*—which terminated the Menominee reservation and transferred title to reservation lands to a tribal

⁴ Respondents conceded that the State could regulate Klamath fishing and hunting for conservation purposes (Pet. App. 41).

corporation—did not additionally and implicitly "abrogat[e] the hunting and fishing rights of these Indians." 391 U.S. at 412. The Court emphasized that "the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress," *id.* at 413, quoting *Pigeon River Improvement Slide & Boom Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138, 160 (1934) and that the legislative history reflected a congressional concern to not violate any treaty obligation. 391 U.S. at 413. See also *Bryan v. Itasca County*, 426 U.S. 373, 391-393 (1976).

So here. Indeed, in this instance, the intent not to terminate tribal treaty rights was made express. Section 14(b) of the Termination Act provides that nothing in the Act "shall abrogate any fishing rights or privileges of the tribe or the members thereof enjoyed under Federal treaty," 25 U.S.C. 564m(b) (Pet. App. 71). The relevant treaty expressly reserves the "right of taking fish" within the area in suit (16 Stat. 708; Pet. App. 64) and it is long since settled—and not now disputed—that the right to hunt and trap is equally embraced by the treaty (see Pet. App. 51-53; Pet. 3, 11). As the court of appeals noted (Pet. App. 35-37), the legislative history supports the conclusion that tribal treaty rights to hunt and fish were beyond the scope of the Termination Act and were reserved to the members of the Tribe.

b. The fact that many members of the Tribe who were enrolled under Section 3 of the Act in 1954, including respondents, received their per capita share of tribal property and withdrew from the tribal rolls

under Section 6 does not alter the conclusion that the tribal treaty rights remain enforceable for these persons and their descendants. As the court of appeals correctly noted (Pet. App. 38), Section 19 of the Termination Act, 25 U.S.C. 564r, preserved the Tribe's authority to exercise such powers under its constitution and by-laws as are consistent with the provisions of the Act. This necessarily embraced the authority to determine tribal membership for the purpose of exercising treaty hunting and fishing rights reserved by Section 14(b). See *Roff v. Burney*, 168 U.S. 218, 222-223 (1897). Cf. *United States v. Wheeler*, 435 U.S. 313, 323 (1978); *Adams v. Morton*, 581 F.2d 1314, 1320 (9th Cir. 1978), cert. denied, No. 78-927 (Mar. 19, 1979). As the court of appeals concluded (Pet. App. 37-38), the purpose of the tribal roll under Section 6 of the Act was to determine who was to receive a per capita share of tribal property at that time, and not to determine who may exercise tribal treaty rights in the future.⁵ The latter determination was left to the Tribe under Section 19 of the Act.⁶

⁵ The effect of withdrawal by any tribal member under Section 6 was to sever his rights to the tribal property that was distributed under the Section of the Act. It did not discontinue his claim to enjoy tribal rights that were unaffected by the Act (Pet. App. 38). The creation of tribal rolls for a specific and limited federal purpose is not unusual. See *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73 (1977).

⁶ In speaking of the "descendants of persons on the final roll" (Pet. App. 38), the court of appeals should not be

c. The fact that the former reservation lands are no longer owned by the Klamath Tribe does not extinguish the tribal treaty rights in the context of this case. These rights were reserved to the Klamath at the time the lands were transferred from tribal ownership by Section 14(b) of the Act, 25 U.S.C. 564m(b). The treaty rights may thus be exercised throughout the federally-owned lands of the former reservation. See note 3, *supra*. The case is distinguishable in this regard from *Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165 (1977) (*Puyallup III*), on which petitioners rely (Pet. 18-19). In determining in *Puyallup III* that the tribe had lost its exclusive treaty fishing right on lands conveyed out of the reservation, the Court relied on the fact that the Puyallups had themselves "alienated [the land] in fee simple absolute * * *." 433 U.S. at 174. Here, by contrast, the land taken under the Klamath Termination Act was taken subject to the reservation of tribal treaty rights under Section 14 (b) of the Act. Moreover, the Klamath do not claim an *exclusive* hunting and fishing right on the lands of the former reservation; their claim is that the Act reserved to them only a *non-exclusive* right to hunt and fish subject only to state regulation for conservation purposes (Pet. App. 40). See *Puyallup III*, *supra*, 433 U.S. at 175.

understood as restricting tribal authority to fix the conditions of membership. Presumably, the court meant to embrace only descendants who otherwise qualify under the Tribe's membership rules.

2. Petitioners' speculation that the decision in this case will leave the State powerless to prevent "destructive hunting practices" by the Klamaths (Pet. 13) is unsupported. The State's authority to regulate Klamath hunting and fishing for valid conservation purposes is not challenged by respondents (Pet. App. 41). Consistent with this Court's decision in *Department of Game v. Puyallup Tribe, Inc.*, 414 U.S. 44, 48-49 (1973), the court of appeals has remanded this case to the district court for further proceedings to determine the extent to which the State may engage in conservation regulation of the treaty fishers and hunters. The scope of permissible state regulation can be determined only after a detailed analysis of the factual conditions attending fish and wildlife propagation and conservation in southern Oregon. Cf. *Puyallup III*, *supra*, 433 U.S. at 175-177. It is therefore premature to conclude that the State's valid regulatory interests will be materially affected by the course of future proceedings in this case. Further review of the court of appeals' decision at this time is, for this additional reason, therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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